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THE LEGAL RIGHTS OF SOUTHERN CITIZENS AFTER THE WAR.

An article upon this subject, headed, "The Legal Status of the Rebel States, before and after their Conquest," appeared in a late number of *The Law Reporter*, to which we feel constrained to reply. The author concludes that we may abolish the State governments, appoint governors and other officers over the people; Congress may enact all laws for them, the first law being, *of course*, one to abolish slavery. There are, we conceive, a great many fallacies in the author's argument, as we shall attempt to show.

Before proceeding to his argument, we desire to present a few fundamental principles which the American statesman should never forget.

1. In America, (whatever be the rule elsewhere,) *the people* are sovereign. The legislature is but their agent. All government officers, from the highest down, are but the servants of the people. Allegiance is due then to *the people*, not to the government. The government is but the officers; they but represent the people. Allegiance is a debt; we *owe* that debt, as we would any other, not to the *attorney appointed to receive it*, but to the principal. Our duty and obligation are to him.

Allegiance is due to the people, not merely *in their corporate capacity*. Citizens act in a corporate capacity, we apprehend, *only when they are voting*, either in a corporate assembly or at the polls. But allegiance is due to them at all times, and in all places; as well when sitting by the fireside, or tilling the ground, as when assembled in mass-meeting. It is due then to the people, as *individuals*, to each and every individual.

Each citizen is then *a sovereign*. Each has a right to require allegiance.

Allegiance is due *from* every individual, and due from him in his individual, not his corporate capacity. Each citizen, then, is *a subject*. In a word, every man is, in his own person, at once SOVEREIGN and SUBJECT.

Allegiance, and its correlative, sovereignty, are, as it were, a tie between one citizen and another, binding each to the other, and, as it were, sending messages *both ways*. This tie extends from each citizen to every other, and from every other to him. There is a perfect maze or net-work of these ties. The *obligation* is like the effect of gravitation among the particles composing the earth; each particle operates upon, and is operated upon by every other.

2. In a STATE (meaning, as that term properly does, an *independent nation*,) the people have all the sovereignty; all the items or attributes. No power *outside* can claim allegiance from its citizens. Each citizen owes *all* his allegiance to the rest, none to any *outside* authority.

Allegiance is a complex term; it embraces many kinds of duties. For instance, it requires us to pay taxes; to assist by advice (vote) in carrying on the government; to bear arms. Each citizen owes *all* these duties to the rest.

3. A State may *transfer* this allegiance from itself; as when it attaches itself to another sovereign nation. It may transfer *a part* of the attributes of sovereignty, as when it attaches itself to another nation *upon terms:* as if, for instance, it were stipulated that her citizens were not to *pay taxes* to the new sovereign. Sovereignty, *absolute*, *ultimate* sovereignty is, then, *divisible*. States every day divide sovereignty in creating subordinate municipal corporations. This kind of division is, however, but temporary, revocable. The *ultimate* sovereignty remains in the State. But *a transfer*, to an outside power, of the whole, or a portion, without terms, is irrevocable, and for all time.

4. It was, as we understand it, *a division* of sovereignty which took place *when the American States formed the Federal Union*. Certain *attributes* of absolute sovereignty were *transferred*, out and out, to the general government. *The people* of each State transferred to the *whole people of all the States* these attributes. Each citizen of each State is to owe allegiance in respect of these attributes, not exclusively to the citizens of his own State, but to every other citizen of every other State, and every such other citizen to him. As to *those items* of allegiance,

the circle of his duty is enlarged an hundredfold; his *sovereignty* is enlarged in the same proportion; where one owed him loyalty before, an hundred do now. The attributes thus transferred were such as pertain, for instance, to dealings with foreign nations, to *national* transactions. The *area of gravitation*, in these respects, is enlarged, as if by magic, and embraces the whole United States.

> "No pent-up Utica contracts our powers,
> But the whole boundless continent is ours."

The citizen of Maine is linked to him of California, he of Oregon to him of South Carolina, and each and all to every other. The magnetic Cord of State, allegiance, has, as it were, been untwined, and *a portion of its strands* been attached to new sovereigns all over the Union. The attributes of State sovereignty, not thus transferred, the *domestic* ties remain in the people of the respective States: each citizen owes his allegiance in respect of them as before. Those not *expressly* transferred are retained.[1]

The general government did not become A STATE in the proper sense of that word; it did not obtain absolute, total sovereignty. Neither are the States STATES. Both are political creations, which are *sui generis*. Each is sovereign in its sphere, but the spheres are distinct, limited.

5. It was not the States, *as such*, which formed the federal government. It was not a mere compact of States.

This is a point of vast importance, and one upon which statesmen have greatly differed.

The general government was formed by *the transfer*, to it, of *the allegiance* (in certain particulars) due from *somebody*. Such allegiance was due not from the States. The States, as such, owed no allegiance to any power *before*. They were sovereign, and allegiance was *due to them*. Of course, then, a State did not transfer *its own* allegiance from any other power to the federal government.

A State, as such, cannot *assume* allegiance, or owe it. A "State" is a body politic, a corporation, a myth. It cannot bear arms, or vote.[2]

A State, as such, cannot be loyal. Loyalty is an affection, a sensibility, a thing of the *heart*. Corporations have no heart. They are pure *intellect*, *the concentrated intellect of all its members*.

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[1] Amendment to Constitution, Art. 10. [2] 10 Coke, 326.

To be loyal is *to feel* the sense of obligation; to *be willing* to render allegiance when required. A State cannot feel, or desire.

Again, the State, as such, did not transfer *the allegiance of its citizens*. A State might relinquish *its own* claim to allegiance, but it could not transfer it to another power. No legislature could lawfully require me to pay taxes to the Queen of England. Still less could it transfer my *loyalty*, my affection, desires. It might *force* me to pay the taxes, to *render* allegiance, in acts, but that is not (if done unwillingly,) loyalty.

It was not the people *acting in their corporate capacity* which formed the federal government. The people so acting are *the State*, the corporation. The people, in conventions, *did vote* to adopt the federal Constitution. That vote was but *the consent of the individual members composing the majority, to transfer their own allegiance*, and to surrender *their claim* to the allegiance of the minority. It could not *transfer* the allegiance of the latter. The minority did afterwards express consent *by act*, to wit, by remaining in the country, and *rendering* allegiance to the new government. But the vote of the majority was futile as far as they were concerned. As well might the legislature, by vote, require me *to love*, as a brother, a mere stranger.

The State *government* (to wit, the officers, governor, legislature, &c.) did not form the general government. They *represent* the people, and could do no more than the people could.

Our allegiance or loyalty is one of the things which we do not submit to *the will of a majority* in the State, any more than we do our other *affections*.

6. This brings us to the first argument used by the author of the article to which we have alluded. He says the Southern States, *as such*, have rebelled.

To rebel is to disown allegiance. He only can rebel who owes allegiance. If the Southern States have rebelled, then it follows that they owed allegiance; that the States, as such, formed the Union; that the Union is but *a compact of the States*. This is the very doctrine the secessionists have always maintained, and, if correct, their rebellion is no rebellion.

But the States, as such, did not owe allegiance, as we have shown. Of course they did not, and could not, in the nature of things, rebel.

The *legislatures* of the respective States did not, as such, rebel. Their members, *in their individual capacity*, perhaps did. They could not by possibility vote away *the right* which the general government has to the allegiance of each citizen;

the right which I, as an individual, one of the sovereigns, have to that allegiance. Nor could they *transfer* that right from the federal government to the Confederacy; nor from the citizens of the United States at large, to those merely of the Confederacy. Such a vote is mere *brutum fulmen*. It is but evidence of the disloyalty of its members. Still less could the legislature transfer from the general government to another power the loyalty of its citizens. It had by law no *authority* to do so; it had no *power* to affect the *will*, wishes, affections of individuals, or transfer affection from one object to another.

The legislature might, by brute force, compel the citizen to bear arms against our government, to *withhold* allegiance from us, to do *acts* of allegiance to the Confederacy. But the citizen may be loyal, notwithstanding. Treason is in *the will*. Overt acts, even, may not be a *true index of the will*.

Our author also claims that the people, *in their corporate capacity*, rebelled. Suppose the people did, in mass-meeting, pass a vote of secession. Such vote is the vote of the State, the corporation. It could not divest us of our *right* to the allegiance of all the citizens; it could not discharge the citizen. Still less could it reach *the will* of the citizen. Such a vote is mere nullity, *a farce*.

The claim of our author leads to an absurdity. If the States, as such, have rebelled, they must, as such, be *hung;* if the citizens, in their corporate capacity, have rebelled, they must, *in that capacity*, be hung. The penalty of treason is *death*.

A very little thought as to the meaning of the terms, *the State*, the body politic, and the like, will show any one, it seems to us, that this claim is wholly unfounded, both in law and logic.

7. Before proceeding to the next argument of our author, let us look at some of *the items* of sovereignty and allegiance which exist between the respective citizens of the United States. I, a citizen, say of Massachusetts, have a *right* to demand that the citizen, say of Georgia, shall perform all his political duties towards me; that, for instance, he shall, if required, *pay taxes* to the general government to assist in carrying it on, so that I may be protected by it in my person and property; that he shall vote for members of Congress, and for President, thus *advising* as to the *policy* of the government.

On the other hand, I *owe* a duty *to him*. I must *be loyal* to him, as well as he to me. Loyalty in me requires that I do the same things to him that he is bound to do for me. My loyalty requires, among other things, that *he shall be governed, as to all matters not within the scope of federal authority, by officers*

elected by the people of his own State, and by laws of their enacting. So it is "nominated in the bond."

That citizen may, it is true, by treachery to me, forfeit his right to my allegiance and loyalty to him. But his treason can only be committed by himself, in his own proper person, not by another as proxy for him. His *duty* is personal, individual; his crime must be the same.

Among the other items of allegiance I owe to the citizen of Georgia, are the following: "The judicial power shall extend to all cases in law and equity, arising under this Constitution."[1] "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed."[2] Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court."[3]

In view of all this, who is to decide whether the citizen of Georgia has committed the highest of all crimes known to the law? Shall I? Shall you? Shall the loyal citizens of all the loyal States? Shall their representatives in Congress? No, a thousand times No. To do so would be *to rebel ourselves;* to commit the very crime of which *we charge him*, but of which he may, after all, be guiltless.

If we are to try him, what *evidence* are we to have? The fact that he resided within the territorial limits of the State of Georgia? that he occupied a few feet, and cultivated a few acres *of land* in a particular locality? Is that an *overt act?* Is that levying war, or giving aid and comfort to the enemy?

Is the fact that his *neighbor* has committed treason, to be sufficient evidence as against him? the fact that all his neighbors have—that a majority of the people of his State have—or that they have *voted* that he should, or have by brute force compelled him to do acts of disloyalty?

When we have tried and convicted him, all unheard, what is to be *the penalty?* Is he to be *legislated* out of his property, his slaves forever freed? Before answering this question, let us look at one or two other items of our allegiance to him:

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[1] U. S. Const. Art. III. sect. 2.
[2] Ibid.
[3] Ibid.

"No bill of attainder or *ex post facto* law shall be passed."[1] "No attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted."[2] In view of this, shall we punish him by a law which did not exist when his crime was committed, in a manner absolutely forbidden by the express terms of our compact?

Shall we thus try, convict, and punish, by the wholesale, every man who happens to *occupy land* south of Mason and Dixon's line? What name, if we do, shall be given to our *wholesale rebellion?*

8. But our author comes to the conclusion, by a course of argument quite satisfactory to himself, that it will be our right and duty to declare, by act of Congress, the property, lands, slaves and all, of Southern people *ipso facto*, "confiscated," to appoint governors over the different States, and enact all laws for their guidance.

Our author cites Judge Grier,[3] as holding that the States *as States* seceded. This is an utter perversion, both of his language and meaning. His language is not that they *seceded* as States, but that in organizing the rebellion, and in carrying on the war, they "*acted* as States *claiming* to be sovereign over all persons and property within their respective limits, and *asserting* a right to absolve *their citizens* from their allegiance to the federal government;"[4] claiming, asserting a right, not *having;* a right to absolve, not themselves, but *their citizens* from allegiance. The judge was simply arguing to prove that the rebellion was not a mere insurrection, but an organized war, and one of magnitude; in a word, that the rebels were *belligerent*, and their property, when captured during the war, was *Prize of War*. This doctrine no one, at the present day, doubts. England and other nations have expressly recognized them as belligerent, and our own government have done so in act, though not by words.

But this brings us to the next argument of our author. He argues thus: The rebels are belligerent; *ergo*, they are foreign, the *territory they occupy* is foreign; *ergo*, when we conquer it we may treat it as any other "foreign" territory conquered from a foreign nation; to wit, impose upon it an absolute sovereignty, and such laws as we choose.

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[1] U. S. Const. Art. I. sect. 9.
[2] U. S. Const. Art. III. sect. 3.
[3] Prize Cases, 2 Black, 635.
[4] 2 Black, 673.

Even Judge Grier, our author's own authority, holds the very reverse of this; for he speaks of the rebels as "*not foreigners.*"[1]

But let us examine this argument. "The rebels are belligerent." This we admit to be true. But we deny that this makes them "foreigners." What is the meaning of the doctrine that they are belligerent? Simply that, as the word implies, they are *carrying on war;* not a mere insurrection, they are not a mob, their soldiers not murderers, nor their sailors pirates. They have raised an army, and a very respectable one at that. Being belligerent, *they are to receive at our hands, while the war lasts, the usage common among civilized nations when at war.* That is the extent of the rule. They are to be *treated* as foreign enemies *for the purposes of war.*

But this is a rule to be applied *during the continuance of the war.* It has no sort of application to the state of things to exist *after the war has ended.* That is to be a state of peace. This legislating of slavery out of Georgia is to be a *punishment for past crimes,* not a carrying on of war. Our author confounds the two things and the meaning of the rule.

The rule is that they are to be *treated as* foreign enemies. Our author would have it that they are to *become foreign in fact,* for all purposes. That is not the rule.

Our author next argues that having become thus foreign for all purposes, "it follows, as a logical necessity," that the *territory they occupy is foreign.* We cannot perceive the logical sequence our author finds here. If this be logic, then Pennsylvania was foreign, in 1863, when occupied by the rebels; and having reconquered it, we may now appoint governors, and enact laws for the astonished Pennsylvanians!

Our author goes further: The territory is not only foreign, but the Confederacy has become a government *de facto,* and is foreign, independent. Here is a second illustration of the *meeting of extremes.* This is the very doctrine that Jefferson Davis would give his right arm to have established; the very doctrine which, if established, would lead, within twenty-four hours, to a recognition of the Southern Confederacy by every nation on earth, and an immediate intervention to prevent further hostilities, and the very consummation we all desire, to wit, the suppression of the rebellion.

The Confederacy a government *de facto?* With every port

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[1] 2 Black, 674.

blockaded—with every State invaded—never able to regain a foot of territory lost—her capital besieged? The statesmen of England know better than this. It is not a government *de facto* in any sense of the word. It is a rebellion; an *attempt* to cast off allegiance, but as yet only an attempt. When it is successful, when the Confederacy can *beat back our armies, and hold her own*, then, and not before, will she be a government *de facto*, *her territory* foreign. When that day comes, she will have accomplished *a revolution*. The God of Battles will have decided in her favor, and that her war was not *a wicked rebellion*, but, like our own of 1776, justifiable. But we have not to-day reached that point by far.

They are not foreigners, but *our own citizens;* their territory is not foreign, but domestic, our own. All the conclusions, then, which our author draws on this point, must fall to the ground.

But our author, assuming it to be foreign territory *de facto*, argues that when we conquer it *the political power of the conquered nation passes to us*. This is good *law*. But now what is *the nation* we have conquered? The Confederacy, *not* the separate States. What is the extent of the political power of the Confederacy *over the States?* We all know what that is, and that it *does not reach to domestic concerns:* that "State rights" are more carefully protected under their Constitution than our own. We shall stand exactly in the shoes of the conquered nation, with exactly her power, and no more.

But, our author finds it necessary to assume another fact, to wit, that we are fighting *the respective States*. This is an assumption utterly unwarranted. But suppose it to be true; they are not "foreign" in any sense of the word; they are simply rebels *attempting* to become foreign, but as yet far from it. There can be no such thing then as *a passing* of political power from a conquered "nation"—we have conquered no *nation*, but a horde of rebels.

9. Our author next argues thus: Being at war, we may take enemy's property wherever we can find it; the Confederate Congress have by law empowered their armies to take *all private property;* by virtue of this law, all private property in the Southern States has *ipso facto* become *public property*, and so we may take it all, *slaves included*. And he cites Marshall C. J.[1] as holding that the power of *confiscating* enemy's property is in the Legislature (Congress).

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[1] 8 Cranch, 123.

Before proceeding, we must defend the memory of Chief Justice Marshall from the imputation put upon him by our author. That great and pure man never held that Congress or any other tribunal could condemn a man unheard, or for the crime of his neighbor. The language thus ascribed to him was used in a case as utterly unlike that which we are considering, as it is possible to conceive. It related to a state of war, not peace; to property of an enemy (an Englishman,) foreign *de facto;* to property found within our limits, while the war was progressing. And the chief justice held that even that property, so found, did not become *ipso facto* vested in our government: that it could only do so when Congress had declared by a general law that all such property should so vest. He did not hold that Congress could, by law, declare that all property found within *any particular territory* should so vest, still less that any property whatever could be so vested, *without a trial at law before the court.*

But now to our author's argument. We may take enemy's property. True enough. But that is a rule *of war*, not peace. When peace comes, we have got no "enemy." We are here discussing, not what we may do in war, but how, after peace is conquered, we shall *punish criminals.*

Hear our author again: "The rebel authorities are empowered to take all private property, etc., and *this converts all private into public* property, and justifies our armies in taking it." Whether it is "public" or not, our armies may lawfully take it. This also is a "war power;" we may do it *in self defence*, and to cripple our enemy. But, does the law of the rebel Congress "*per se*" "convert all private into public property?" If it does, it is the most "remarkable conversion" on record. It has no such effect. The property, *until taken*, remains private.

Our author cites several decisions made in reference to the action of our government in appointing military governors over territory acquired from Mexico. Some of the cases relate to such appointments made *while the war was pending.* Of course they have no bearing. Others relate to the period after the war. As to them, all we have to say is, that the territory so acquired did not have *State governments:* not, at least, such as ours. We acquired the rights of the Mexican government, and those rights, if not absolute, extended *de facto*, if we mistake not, to the appointment of governors, and to legislation upon domestic affairs. As to the appointment by the President of military governors, during the present rebellion, in Tennessee, Louisiana, &c., we think it entirely right. We are in *a state of*

war in those States. We hold them only by the strong arm, and are constantly threatened from within and from without. As long as that condition exists, we, as a military necessity, and under the war power, must have military governors. But what we are to do when the war is ended, is a very different matter.

When this rebellion is crushed, we must simply stand *in statu quo ante bellum.* Good faith, common honesty, *loyalty*, require it. We should be disgraced forever if we do otherwise. An Englishman, twenty years ago, came and settled in Georgia. He had read and studied our Constitution, and, on the faith of it, had selected America as his home. His children have grown up around him; he has acquired property, land, slaves. He and his sons are loyal to-day. They have resisted secession to the last. His sons are forced into the army, but against their will. They long for peace, they would welcome with joy the return of the old flag. Shall they, in addition to all the other suffering already imposed upon them, be hung, quartered, their children beggared, for treason? shall they be condemned unheard, without evidence, by a *legislative* body? Justice, religion, God, forbid. Let us crush this cursed rebellion at any cost. Then, punish *the traitors*, but do not condemn the innocent with the guilty.

One word more for our author. He is distressed at the idea that *a minority* are to conduct the State government. If the majority are proved disloyal, and you *disfranchise* them, then the minority will be *the majority*. We need borrow no trouble on this score. We have all along believed that the majority in most of the Southern States have always been loyal. But, whether this be so or not, when peace comes, and rebellion is found hopeless, we shall find plenty of men who will submit, with the best grace possible, to our power, and be loyal, at least in acts, for the rest of their lives. They will have received a lesson, never to be forgotten, of the danger of bearding the lion in his lair.

If they will not submit, let them be hanged or banished, and their places filled, as they soon will be, by loyal men from abroad.

But even if there are *but ten* loyal men left in Georgia, those ten are the State; they, as individuals, have their political rights, and cannot forfeit them, except by individual crime. Their rights are *vested*, by the Constitution. That compact contains no provision or *condition subsequent*, by which a State shall cease to be such by reason of the reduction in number of its people, or that its people shall be *divested* of their estate, except by their own consent, or by crime.

We go even further, and claim that if *not one* citizen be left, *the State* still exists: as the mind may exist without the body. This is our contract, made in 1789, with the people then occupying the territory embraced within the Southern States. We covenanted that they and *all who should come after them*, should have certain rights; all who should occupy the same lands; the covenant is one which *runs with the land*. If the land is vacant now, the right vests in the people who hereafter shall occupy them: it is only in abeyance now. The franchise, the political rights exist; whoever shall go there to reside, becomes clothed with the right as with a garment. Lord Coke says, "A void place or soil in which an house is intended to be built, may, by the king's charter, be named a house, and this *nominative* house shall be sufficient to support the name of the incorporation."[1]

10. The arguments to which we have alluded are, we believe, all that our author has used. They are the foundation of his superstructure. If, as we believe, they are *rotten*, his whole fabric of territorial government, beautiful as it may seem to the eye, must fall to the ground. If we are right, the establishment of such governments would be disloyalty on our part; it would be *tyranny* in its most odious form; we would become a stench in the nostrils of good men all over the earth: the act would stand upon the pages of history as a great national crime.

Before the American Constitution was adopted, each State was (we will say) sovereign—its people held *all* the attributes of sovereignty, each *man* was an absolute sovereign. For the sake of national strength, and consequent better protection to each citizen, each consented to transfer *a portion* of the sovereignty due him to the federal government. Much discussion arose as to what portion should be assigned; some desired more, some less. Each yielded in part: the bargain was closed. Now, if we of the North made a *bad* bargain, it is yet *our bargain*. We are *pledged* not to claim more than was granted; not to trench upon rights *reserved*, rights never granted to, never held by us. Let plighted faith be maintained, though the heavens fall.

In the case of Florida and other new States admitted since 1789, there might be more show of right on our part, inasmuch as at one period the general government held *complete* sovereignty over the territory embraced within their limits, and

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[1] 10 Coke, 326.

whatever attributes they have were *a grant* from us. But as to the *original thirteen* no such thing is true. And even as to the new States our grant was irrevocable; they were clothed with the same rights as the original States. In none of them can we deprive a single citizen of his rights, when he has not been guilty of any crime known to the law.

We cannot better close our article than by quoting the language of that learned author, Dr. Francis Lieber, used in a work pronounced by Chancellor Kent as "excellent in its doctrines and enriched with various and profound erudition." He says,[1] "In whatever light, then, we may view justice, privately, publicly, or internationally, it is all important. It is the foundation of character, the basis of power, the aegis of liberty, the sole support of self-respect; and a great secret of the art of ruling is contained for republics as well as for monarchies, at home and abroad, in the two brief words, BE JUST."

RECENT AMERICAN DECISIONS.

United States District Court.

Massachusetts District.

THE STEAMER ELLA AND ANNA, PRIZE.

Where a prize is made by one vessel alone, other vessels who claim to participate in the proceeds solely on the ground that they were within signal distance, have the burden of proof to establish all the facts necessary to sustain their claim. To give such vessels a right to participate in the proceeds, it must appear that they were within a distance at which signals could have been seen in the state of atmosphere and other circumstances existing at the time; and it is not enough to place them within a distance at which signals might have been seen under other circumstances. Where signals were not actually seen from the mast-head and answered, and the answers seen, it is not enough to show that they might have been seen from the mast-head, but not from the deck. At the time of this capture, November, 1863, there was no system established by which guns or rockets can be held to be the kind of signals referred to by the statute for distributing prize money, supposing that such a system can be carried into effect. Within signal distance means within a distance at which signals can be so made out that communications to and from

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[1] 2 Polit. Ethics, B. iii. sec. 10.

can be intelligently exchanged. Upon the evidence in this cause it is not established that Coston's Night Signals can, under the most favorable circumstances, be intelligently read at a distance of eight miles.

SPRAGUE J.—This vessel and cargo have been condemned as lawful prize, and I am now called upon to determine to what vessels of the navy the proceeds shall be decreed.

The capture was made by the steamer Niphon, commanded by Lieut. Breck. Four other vessels, the Shenandoah, Houqua, Daylight and Tuscarora, have severally presented applications to be admitted to share in the proceeds. The petitioners rest their claims solely on the allegation that they were respectively "within signal distance of the vessel making the prize."

Prizes belong primarily to the government. The policy and propriety of giving the proceeds wholly or in part to the captor are manifest, but why should others who did not even aid in making the capture, share equally with those who actually made it? A glance at the history of the law on this subject, may be of use in discovering the reason. In England, from an early period, prizes have been granted by statute to "the takers." This language, in its natural import, embraces only those who actually make the capture. But the judicial tribunals introduced what they denominated constructive captors, and of these there were two classes. One of these was admitted to share by reason of being in sight at the time of the capture, and the other because of being intimately associated in a common enterprise. The doctrine that vessels in sight should be admitted as constructive joint captors was established prior to the year 1799. At that time this doctrine was adopted by an act of Congress which remained in force one year. But this provision was reënacted by statute of 1800, ch. 33, by which one half of the proceeds of prizes, when of inferior force, were, in the first place, by sec. 5, given to the captors, and then, by sec. 6, vessels of the navy in sight at the time were entitled to share equally with the captors. This continued to be the law of the United States until the year 1862, when by Stat. –, chap. 204, sec. 3, "signal distance" was substituted for the being in sight. Thus our enactments respecting being in sight and within signal distance seem to have had their origin in the doctrine of the English courts. Upon what reason was that doctrine founded? The statute, as we have seen, gave the prize to "the takers." But, who were to be deemed the takers? If there was a battle, all those who took part in the conflict were clearly actual captors. But then there was

another class of vessels, perhaps of superior force, who were in such immediate proximity, and took such positions to prevent the escape of the enemy, as actually and materially to contribute to the result. Then came another class, whose mere presence constituted such an overwhelming force at hand, that it might be presumed to have contributed to the capture, by intimidation to the enemy and encouragement to the friend; but what should be deemed such presence, and under what circumstances would such a presumption arise? The line must be drawn somewhere, and the courts prescribed the rule, as follows: In the first place, that none but king's ships could share by reason of being in sight. Privateers were excluded because, not being bound to render assistance, there was no sufficient presumption that they would do so. And, in the next place, to entitle king's ships to share, it was necessary that they should be actually in sight both of the capturing and captured vessels, under such circumstances as would give encouragement to the captors and cause intimidation to the enemy. If the king's ship was utterly disabled, or prevented by other duties from rendering aid, as, for example, if she was engaged as convoy, or if she continued on a course which was carrying her away from the scene of the capture, making it manifest that she did not intend to cooperate, she was not admitted as a constructive joint captor. Thus the doctrine of the courts by which vessels in sight were permitted to share was founded on the presumption that their presence contributed to the result, at least by encouragement to the one party and intimidation to the other. This doctrine was modified or guarded by stringent rules respecting the kind and degree of evidence that should be required. In the first place, as already stated, direct evidence of being in sight was indispensable. In the second place, testimony coming only from the asserted joint captors, however strong, was not sufficient, and Sir William Scott, speaking of the asserted joint captors, lays down this rule:—"The law imposes upon them the task of bringing unequivocal, direct and unsuspicious evidence of their claim." Again, in the same case, he says, "When no actual assistance is alleged, the presumption of law leans in favor of the actual captor." (The Robert, 3 Rob. 201.)

The doctrine of constructive capture, limited and guarded as it was by these rules, still appears not to have found favor with the legal profession; and the courts themselves sometimes admit that it had not been sufficiently restricted and guarded. (The Vryheid, 2 Rob. 16; The Financier, 1 Dods. 67; The Odin, 4 Rob. 325; La Furieuse, Stew. 179; Le Nimen, 1 Dods. 16; The Arthur, 1 Dods. 425; L'Etoile, 2 Dods. 107.)

The change made by substituting signal distance for being in sight, by our statute of 1862, is far from being immaterial, and English decisions are not authorities to be implicitly followed. But when the reasons upon which they are founded are applicable, and commend themselves to our understanding, they are entitled to consideration, not only for their intrinsic force, but as having been adopted and acted upon by judicial tribunals of very great experience and intelligence.

Without going as far as the English courts, we may at least say that those who claim to share equally with the actual captors should be required to produce evidence of such character and weight as to satisfy the mind of the court, and render it reasonably certain that they were within signal distance. Reason and policy dictate that no part of the prize should be taken from those whose vigilance, energy, skill or courage achieved the capture, to be given to others who contributed no assistance, and were so remote as to render it very doubtful whether a request for aid could have reached them, if aid had been desired.

Questions have heretofore arisen in this court upon the provisions of the statute respecting signal distance, but none in which the evidence was so multifarious and conflicting, or which required so close a scrutiny into the principles by which the court should be guided in analyzing, weighing and applying the evidence, and giving a true construction and proper effect to this new provision of the law.

The first question that presents itself is, What signals are sufficient? It has been contended in this case, and in prior cases, that signals by guns or rockets answer the requirement of the statute. Without undertaking to decide that a code or system of such signals may not be invented and adopted, so as to answer the purposes of the law, it is sufficient to say that the evidence does not show that any such system has been established. This capture was made by one of the blockading squadron off Wilmington, N. C. It appears that the commanding officer on that station had given instruction to the vessels of the squadron that, upon discovering a blockade runner, a rocket should be thrown up in the direction in which she was going, and a gun fired to attract attention. This is the extent to which any particular meaning was attached to those acts. The direction of a rocket indicated the course of a blockade runner. A gun was to be fired, but without any special significance, and having only its natural effect of arresting attention. The most that can be said is, that by these means

notice was given that there was a blockade runner going in a certain direction, but they were not signals by which there could be any intercommunication. There was no recognized mode by which a vessel seeing a rocket and hearing a gun, could return any answer, even to the extent of making known the fact that they were observed. If a vessel should throw up a rocket or fire a gun under these instructions, it could not be construed into an acknowledgment of the notice, but the meaning would be that such vessel had discovered a blockade runner taking a certain course, and wished to attract attention.

In the case of the Aries, (26 Law Reporter, 336,) it appeared that the commander of the blockading squadron off Charleston, S. C., had given orders that a rocket should be thrown to indicate the direction in which a blockade runner was going, and that if two guns were heard, in quick succession, it was the duty of the vessel hearing them to go immediately and ascertain the cause of the firing. This went somewhat farther than the instructions to the squadron off Wilmington. Yet, in that case, I held that no such system of signals by guns or rockets had been established as would meet the requirements of the statute.

Lanterns have been spoken of by several of the witnesses as being frequently used. But it is admitted that they cannot be seen as far as Coston's Lights. It is unnecessary, therefore, to make any remarks respecting them. This capture was made at night, and the result is that the only signals which can be regarded in the present case are those denominated Naval Night Signals, that is, Coston's Lights.

The next inquiry is, from what part of the vessel must the signals be visible? Is it sufficient if they might be seen from the mast-head, and not from the deck? It is a great privilege to any vessel to be allowed to share in a prize which she has not actually aided in capturing. Such indulgence is not to be granted without good reason. It ought not to be enjoyed by any vessel, unless she is within such distance as gives assurance that she would render actual assistance if called upon, and could afford encouragement to the captors, by their knowing that such assistance was at hand.

On board of a vessel at sea, there is at all times kept a watch on deck, composed of some of the officers and a considerable part of the crew, some of whom are specially designated as the lookout, and all are required to be vigilant. In a well-ordered ship, a light exhibited in any part of the horizon would be immediately discovered and attended to. A man may indeed be sent aloft and stationed there as a lookout, but this at night

is exceptional; and if by such means a signal should be discovered, which could not be seen from the deck, still it would not avail unless there should also happen to be a man at the mast-head of the capturing vessel, who should see the signals made in response. The possibility that signals might be interchanged in such manner does not answer the purpose of the statute. It does not give adequate assurance that if the capturing vessel had shown the usual Coston's Lights, they would have been seen and read, or, if seen, that the answering signals, made in the usual manner, would have been discovered and understood by the capturing vessel so as to give her that encouragement and confidence which the knowledge that assistance was at hand might inspire.

I am not speaking of a case in which signals are actually interchanged, and seen and understood by means of persons at the mast-head of both vessels. I have no occasion to consider and express an opinion upon such a state of facts. In the present case, no signals were made. (In England a vessel being visible from the mast-head only, although actually seen from that position, is not deemed to be in sight so as to be entitled to share in the prize.)

Another question has been presented. Some of the witnesses from the petitioning ships say that under the most favorable circumstances Coston's Lights may be seen nine miles, and thence infer that signal distance always means that number of miles.

This is founded on the assumption that signal distance is a certain number of miles, and is applicable to all cases, without regard to the state of the atmosphere or other obstructions in the particular instance. This is an error. The statute confers the right of sharing in the proceeds upon any vessel of the navy which "shall be within signal distance of another making a prize;" that is, if she be within signal distance of *that* vessel at *that time*. If the state of the atmosphere, from fog or haze, for example, is such as to prevent signals being seen, neither the language nor the reason of the statute is satisfied. Of what benefit would it be to a capturing vessel that another should, without her knowledge, be within a certain number of miles, but to which she could make no communication, and from which she could receive no encouragement, by promise of assistance or otherwise?

The question, then, is reduced to this,—If, at the time of making this capture, the Niphon had made signals by Coston's Lights in the usual manner, were these petitioning vessels, or

was either of them, within such distance that such signals could then have been seen and read from her deck or top-gallant-forecastle?

The Niphon was one of the blockading squadron off Wilmington. The line of the coast there lies nearly north and south, the sea being to the eastward.

On the morning of the 9th of November last the Niphon was a short distance from the shore, and at about twenty-five minutes past five o'clock, when it was so dark that a ship could be seen but a short distance, she discovered a vessel running down the coast, that is, from north to south, very near to the beach. The Niphon immediately steered toward the shore, in a direction that would cut her off, and fired at her from the bow, and, when quite near, from the broadside also. Very soon after the Niphon had taken a direction to cut off the strange vessel, it was discovered that the latter had altered her course to the eastward, and was aiming to run the Niphon down, by striking her amidships. Both vessels were at full speed. The commander of the Niphon immediately ordered her helm hard to starboard, by which her course was changed so as to be nearly in the same direction as that of the other vessel. They struck each other at the bows. A portion of the Niphon's crew immediately jumped on board the other vessel, and carried her by boarding. This was from ten to fifteen minutes only from the time she had been first discovered. She proved to be the Ella and Anna, an iron steamer of about a thousand tons burden, with a full cargo. She had forty pounds of steam on, and several hundred pounds weight on her safety valve, and must have been going at her utmost speed. The Niphon was a steamer of 500 tons burden, with an iron frame and wood planking. If she had been struck on her side, nearly at right angles, as the enemy had intended, she must have been so seriously injured that she would probably have gone down in a few minutes, and there was but little chance for any of her crew to have survived.

As before stated, this capture was made at night. No signals were made, and it is not contended that either of the petitioning ships was in sight, or that there is any direct evidence in support of their claims. They rely wholly upon circumstantial evidence. They undertake to establish certain facts, and from them to deduce the conclusion that their vessel was in the requisite proximity.

They have attempted to do this in two modes. First, by ascertaining the position of each vessel at the time of the capture in relation to certain monuments or landmarks on the coast, and

then the distance between such monuments, and thence to infer the distance of the vessels from each other. The other mode is by first ascertaining the time of the capture, and then the time when the capturing vessel was afterwards first seen, and at what distance, and how far and in what direction each vessel had moved in the interval between the capture and their first coming in sight, and from these premises, to infer the distance between the vessels at the time of the capture.

[The learned judge then proceeded to a minute and careful analysis of the evidence of forty witnesses and of the charts. He pronounced the testimony very conflicting, in many respects, especially in respect to the exact time when the chief events occurred, and the estimated distances at which objects were seen. The result to which he arrived on the chief points of fact, may be stated thus:—The capture was made before daylight, on the 9th Nov., at 5.35 A. M. The place of the capture was off Masonborough Inlet, or, perhaps, a little to the north of it The distance from Masonborough Inlet to New Inlet is at least fifteen and one-quarter miles. The wrecks of the Venus and Hebe were seven and one-quarter miles south of Masonborough Inlet, and, of course, eight miles north of New Inlet. Fort Fisher is on the site of the old light-house, at the north entrance of New Inlet. The day rendezvous of the fleet was at a buoy, which was five miles S. E. by E. ½ E. from Fort Fisher, and fifteen miles south of Masonborough Inlet. As to the Shenandoah, the result of all the testimony is, that she was five miles from the shore, and, on the most favorable view to her, at least eight miles south from Masonborough Inlet at the time of the capture. None of the petitioning vessels were as near as the Shenandoah. None of the petitioning vessels knew of the capture until they saw the Niphon and her prize at daylight. The Niphon fired seven guns at the chase, before the capture. These were 32-pounders and a rifled 20-pounder. There was a fresh breeze from the north, yet the reports of none of these guns were heard by any of the petitioning vessels, nor were their flashes seen. The steamer Daylight seems to have been as far south as New Inlet bar, and the Tuscarora at least two miles south of the buoy, and the Houqua a considerable distance south of the Shenandoah, at daybreak. If, therefore, the Shenandoah was not within signal distance, none of them were.

The remaining question was, how far Coston's signals can be seen at a time like this. On that point, each party selected three officers of the navy, as experts, and the testimony of the six was before the court and fully considered. The important question put was, "Suppose the signals given to consist of two or three colors, and to report several numbers in succession, please to state how far, under the most favorable circumstances, such signals can be read and understood with satisfactory exactness." The learned judge said the experts differed as much as the parties. Three of them limited the distance to between four and five miles. One put it at six miles, and two at between eight and ten miles. The three who had had most experience of Coston's signals, put the distance at four and one-half, five and six miles, as the extreme. On the whole, the judge was of opinion that it was not satisfactorily established that Coston's signals could be read and uuderstood, under the most favorable circumstances, at a distance of eight miles, and that was the least distance at which any of the petitioning vessels were proved to have been. He gave no opinion at what less distance they could be read.]

The result of the testimony is that the Shenandoah, the nearest of the petitioning vessels, was at least eight miles distant.

No signals were in fact made. It is not established that Coston's signals can be intelligently read at that distance under the most favorable circumstances. Moreover, the circumstances were not favorable. The witnesses from the Shenandoah, as well as the Niphon, show that there was a haze along the horizon, which the expert says contracts the distance for intelligent vision of colored lights.

The petitions of the Shenandoah, Daylight, Tuscarora and Houqua to share in the prize are rejected, and the net proceeds are adjudged one-half to the Niphon, and one-half to the United States.

R. H. Dana, Jr., for the Niphon, W. A. Field for the Shenandoah, C. C. Dame for the Tuscarora.

U. S. District Court. N. Y. Southern District.

June Term, 1864.

HENRY WINSO ET AL. *v.* THE SHIP CORNELIUS GRINNELL.

SHIPMAN J.—This is a libel for salvage, brought by the owners of the steamship Saxon against the sailing ship Cornelius Grinnell, for services rendered to the latter by the Saxon, near Five Fathom Bank, to the eastward of Cape May, on the 3d of April, 1863. Two questions are raised on the pleadings and proofs:

1. Whether the services rendered come within the rule of compensation applicable to salvage rewards; and

2. If so, what amount should be allowed.

The peculiar character of the case will be best presented by a somewhat detailed statement of the facts which appear proved by the evidence.

The New York and London packet ship Cornelius Grinnell, of New York, valued for the purposes of this case at not less than $22,500, having on board a cargo of the value of at least $100,000, with a large number of passengers and a full crew, left London for New York on the 13th of March, 1863. On Saturday, the 2d of April, at about 10 o'clock, A. M., she hove to in a severe gale of wind, her master supposing that he was off Fire Island, south of Long Island. The ship lay to till the next morning at 4 o'clock, her head being kept east southeast, the gale continuing severe. After 4 o'clock she was

run in west southwest, as it was then supposed, towards New York. Between 12 and 1 o'clock she made the land, which was then thought to be the New Jersey shore. She was then headed off east southeast, and in half or three quarters of an hour struck in shoal water. She then wore ship to the westward, and immediately anchored in five and a half fathoms of water. She lay here, with her head to the wind, which was blowing fresh from the northeast, accompanied with rain, for about an hour, her officers being ignorant of their real position, when the steamship Saxon, owned by the libellants, and running regularly between Philadelphia and Boston, was discovered passing on her trip to Boston. The captain of the Grinnell immediately set signals of distress, and the Saxon bore down for him. When within hailing distance, Captain Spencer, of the Grinnell, inquired of the master of the Saxon if he could tell him where he was. The latter replied that he was on Five Fathom Bank, off Cape May. Captain Spencer then told him that he had struck on a shoal, had a considerable number of passengers on board, and asked him if he would take him to a port of safety. Captain Matthews of the Saxon replied that he would try. Thereupon, after the proper orders, the Grinnell's cable was slipped, and the Saxon took a hawser from her for the purpose of taking her in tow. In attempting to get the ship off before the wind, under her jib and foretopsail, the hawser broke from inevitable accident, and without fault on the part of either ship. The hawser parted near the Grinnell's knight heads, and, though every effort was made to haul it in on the steamer, it got foul of her screw, though her engines were stopped as soon as they could be. Some twenty or thirty fathoms of it were found on the screw after she reached Boston. After the hawser parted, the captain of the Saxon ordered the Grinnell to make sail and follow him, which was done, the two ships steering towards the mouth of Delaware Bay. After sailing five or six miles the steamer stopped her engines to let the Grinnell come up, when Captain Matthews told the master of the Grinnell that he should have to get another hawser to him before night, as it would be ebb tide before they reached the mouth of the bay, and he could not get him to a safe anchorage without it. Captain Spencer then asked him if he could not take him to sea. The captain of the Saxon said he could, and thereupon the steamer led the way, and the Grinnell followed out to sea clear of all shoals, when the Grinnell, on notice from the captain of the Saxon that she was all clear, hauled up on her course for New York. The

Saxon went on her way to Boston. The ships parted about 8 o'clock, Sunday evening, April 3, having been together about five hours. When the Grinnell arrived in New York she was found to be in good condition, no damage having been suffered in the gale. While getting the hawser fast, the sea running high, the Grinnell in pitching, as the Saxon came across her bow, came down on her, staving the boat of the latter, carrying away her rail, and cutting a hole in her deck. This damage to the Saxon was repaired for $260. Beyond this, and the winding of the hawser about the screw, the Saxon received no injury while engaged in rendering assistance to the Grinnell.

Before her arrival at Boston however, she suffered serious injury, to repair which, including loss for her detention during the repairs, cost her owners more than $25,000. The weather continued stormy after she left the Grinnell, and, the evening of the day after, she encountered a heavy gale. She kept her best steam on, and arrived at Pollock Rip, in her usual route, at about 5 o'clock Tuesday morning, about an hour before dead low water. In attempting to cross the Rip, the steamer struck, and was very badly injured, and had to be towed to Boston. Had she not been detained by the services she rendered the Grinnell, she would undoubtedly have reached the Rip at about high water, and passed over it in safety.

The Saxon was a valuable steamer, worth over $100,000, and had a cargo on board valued at $400,000.

To the south and west of Five Fathom Bank, where the Grinnell lay, are shoals, some of which are said not to be laid down on the charts, and as the wind and current were moving in a southwesterly direction, if the Grinnell had parted her chains, she would have been in considerable danger of being wrecked, especially if the gale had increased to a point of great severity. In case of such increase of the gale, she would have been in some danger of parting her cable had she not been rescued.

The Saxon was the only regular steam packet which was due at that point about that time, though Government transports occasionally passed up and down the coast in that vicinity.

Upon these facts the two questions already referred to arise, which have been elaborately discussed by counsel, and they are, obviously, as heretofore stated:

1. Were the services rendered by the Saxon to the Grinnell salvage services, and therefore entitled to salvage compensation?

2. If they were salvage services, what compensation is the Saxon entitled to?

Upon the first point, the court is satisfied that the service rendered was in the nature of salvage. The Grinnell was saved by the timely interposition of the Saxon, from a position of considerable peril. She was at anchor in the neighborhood of dangerous shoals, upon which there was at least some danger of her drifting, in the event of the parting of her cables. One severe gale had just been encountered, which had driven her into the position of danger where she then lay; and though this storm had lulled, it was not entirely over. The sea was high and the wind fresh; and another severe gale visited the coast within a few hours after she was taken out to sea by the Saxon. The evidence is not entirely clear as to the degree of severity of the succeeding gale at Five Fathom Bank, but, judging from the ordinary range of such storms, it is fair to conclude, from the evidence, that it was felt in considerable violence at this point. It is true the Grinnell might have rode out this gale, but the captain was ignorant of his position, and the pilots who cruise the waters in that vicinity were thirty miles away at Delaware Breakwater, and not likely to reach the neighborhood of Five Fathom Bank in such weather. No one can certainly determine whether or not she would have ridden out the gale in safety; and though Captain Spencer thinks she would, as her ground tackle was strong, still it must be conceded that there was more or less danger in her lying there and trusting to the experiment. It is quite evident that Captain Spencer considered his ship in great danger, and was therefore anxious that the Saxon should take him to a port of safety. It is true that he now says his fears at that time were based upon the supposition that his ship was leaking badly, which turned out to be an error. Still, I think it is clear that the ship was in real and unusual danger, independent of the fact whether she was leaking badly or not. The services of the Saxon were, therefore, in the judgment of the Court, salvage services, and come entirely within the rule laid down by Dr. Lushington in the case of the Charlotte (3 Wm. Rob. 71), where he says: "According to the principles which are recognized in this court in questions of this description, all services rendered at sea to a vessel in danger or distress are salvage services. It is not necessary, I conceive, that the distress should be actual or immediate, or that the danger should be imminent and absolute. It will be sufficient if, at the time the assistance is rendered, the ship has encountered any damage or misfortune which might possibly expose her to destruction if the services were not rendered." This doctrine is accepted and

enforced by the Admiralty courts in this country. Mr. Justice Curtis, in the case of *Hennesy et. al.* v. *The ship Versailles and cargo* (1 Curtis R. 353), gives a brief and clear definition of salvage: "The relief of property," he remarks, "from impending peril of the sea, by voluntary exertions of those who are under no legal obligations to render assistance, and the consequent ultimate safety of the property, constitutes a technical case of salvage." Many other authorities to the same effect might be cited, and in view of the general rule, when considered with reference to the particular cases from which it has been deduced, I cannot doubt but that the present case is covered by it.

It only remains to consider the amount of compensation to be awarded. We are met on the the threshold of this branch of the case with the claim that the court, in fixing the amount to be awarded, should consider the damage suffered by the Saxon in striking on Pollock Rip. It is not claimed that the entire amount of this damage should be included in the award, but it is insisted that the Saxon, by the delay of five hours while aiding the Grinnell, arrived at Pollock Rip so much later, and at low water, by which her risk in crossing was increased, and in consequence of which she met with the accident, and suffered great damage. And it is clear that the Saxon would have arrived at the Rip at high water, and therefore, in all probability, have passed over in safety, had it not been for her delay in aiding the Grinnell. In a certain popular and remote sense, when she undertook to get the Grinnell out of danger at Five Fathom Bank, she incurred whatever risks such a delay might subject her to. She took the risk of encountering another storm, which she might escape if she avoided the delay. Whatever increased dangers might arise during the time which her detention in this salvage service at Five Fathom Bank might prolong her voyage were all in one sense hazarded by her in staying by the Grinnell. But these remote and uncertain dangers do not, in the eye of the law, enhance her merit, and thus increase her reward. Though she had been totally wrecked by another gale, which she would have wholly escaped but for her delay of five hours in this service, I apprehend that such a disaster could not be allowed to enhance the salvage compensation. All such dangers were contingent, and the damages which might result from them must be considered in the language of the law, as remote, having no logical or legal connection with the transaction upon which the libel is founded.

We come, then, to the simple question of the amount of compensation due the Saxon for the services rendered at Five Fathom Bank. The elements to be considered in solving this question are well understood. The only difficulty is as to their application. The general rule as to compensation is that it should be liberal. In determining what is liberal we are to consider "the value of the property saved, the degree of the peril from which it was delivered, the risk of the property, and especially of the persons of the salvors, the severity and duration of their labor, the promptness of their interposition, and the skill exhibited." (1 Curtis' R. 361.)

So far as the value of the property saved is concerned, it was considerable; it is admitted, for the purposes of this case, to be $22,500 for the ship, and $100,000 for the cargo. As to the degree of peril from which the ship and cargo were delivered, it is more difficult to determine. It was sufficient to constitute it a case of salvage, but was not that imminent peril which often menaces the certain destruction of vessels on a lee shore. As the wind and sea were at the time of her rescue, she was not in a condition of great peril. To what degree the gale increased soon after her escape, that point is not clear. So far as the risk of the property or persons of the salvors is concerned, there is no unusual ground of merit. There was, comparatively, very little risk to either. The labors of the salvors were neither severe nor long, and though their services were promptly rendered, there was nothing in the exigencies of the case to call for very great skill. On the whole, I think I shall be following the spirit of the rule which calls for liberal rewards in salvage cases, by adjudging five thousand dollars as the proper sum. Had it not been for the untoward disaster at Pollock Rip, I think the salvors themselves would have regarded this as a liberal reward. To this sum, however, I will add two hundred and sixty dollars, the amount of the damage which Captain Mathews stated that the Saxon suffered by being struck by the Grinnell.

Let a decree be entered for the libellants for the sum of five thousand two hundred and sixty dollars, with costs.

Supreme Court of Pennsylvania.

ROBINSON *et al. v.* TYSON.

1. The averments in a declaration that the "plaintiff was ready and willing" to receive goods and pay for them on delivery and shipment, is a material one, and necessary to be proved.

2. Where oil (at a stipulated price) was to be delivered at the cars of a railroad depot, it was held, that a plaintiff, who sued for non-delivery of the same, must, in order to recover, have proved his readiness to receive and pay for it.

3. Where oil is purchased in bond, the purchaser is under no obligation to give the bond required from the owner by the 47th section of the Internal Revenue laws.

Marshall & Brown for plaintiffs in error.
Purviance, contra.

Error to the Court of Common Pleas of *Alleghany County*.

The opinion of the court was delivered by

STRONG J.—The first and second points propounded to the court below by the plaintiffs in error, and which the court refused to affirm, may be considered together. They constituted, in effect, a prayer that the case should be taken from the jury, and that peremptory instructions should be given that the plaintiff could not recover. It is obvious that an affirmance of the points could not be justified by anything less than the fact that the declaration set out no cause of action, or that proof was totally wanting to sustain some one or more of its material averments. It alleged a contract of the defendants to deliver to the plaintiff, on board the Pennsylvania Railroad Company's cars, within a reasonable time, one hundred barrels of oil, of a given description, for which the plaintiff agreed to pay a stipulated price. It further averred a neglect and refusal of the defendants to deliver the oil within a reasonable time, and that the plaintiff had always been ready and willing to receive it and pay for it as provided in the contract. The uncontradicted evidence proves that on the sixth day of November, 1862, such a contract was made between the parties; that on the next day following they met to arrange for the delivery and reception of the oil, and that it was then agreed the delivery should be made within two or three days, or as soon as the funeral of a person then deceased was over, and the defendants had time. It was, however, never delivered, and this suit was brought on the 28th

of November, 1862. That the declaration set out a sufficient cause of action is plain, unless it was defective in not averring a demand had been made for delivery. There was proof, however, of what dispensed with the necessity of a demand, namely: that the parties fixed a time for the delivery. It may be this should have been averred in the declaration, but the absence of such an averment is no sufficient reason for reversing the judgment. An amendment would have been, of course, had it been asked. But it is objected there was no averment or proof of tender of the price. It was not necessary. There was an allegation of readiness to receive the oil and pay for it, and no more is required in the pleadings in such a case. Thus it is ruled in *Waterhouse* v. *Skinner*, 2 Bos. & Pul. 447, that in an action for the non-delivery of goods, the plaintiff need only aver that he was ready and willing to receive and pay for them, and a refusal to deliver, without averring an actual tender. To the same effect is *Rawson* v. *Johnson*, 1 East, 203, and the doctrine is repeated in *Bronson* v. *Wyman*, 4 Seld. 182. Indeed, where by the terms of the contract, the delivery and payment of the price are to be made, not at the vendor's place of business, but at some other place, there can be no actual tender, if the vendor refuses to deliver the goods. And if a tender need not be averred, it need not be proved.

But though the court would not have been justified by any defect of the pleadings, in directing a verdict for the defendants, or, in other words, in affirming their first and second points, there was a radical failure in the evidence. The averment contained in the declaration, that the plaintiff was ready and willing to receive the oil and pay for it on its delivery and shipment in the cars, was a material one, and was necessary to be proved. In *Rawson* v. *Johnson*, 1 East, already cited, the plaintiffs averred a readiness to accept and pay for the malt the defendants had engaged to deliver. This was held sufficient without stating a tender, but Lord Kenyon said that under the averment as made, "the plaintiffs must have proved they were prepared to tender and pay the money, if the defendant had been ready to receive it, and to deliver the goods." In *Porter* v. *Rose*, 12 Johns. 209, it is decided that the averment of a readiness to pay, like other material averments, must be proved on the trial. *Topping* v. *Root*, 5 Cowan, 404, decides the same. So does *Coonley* v. *Anderson*, 1 Hill, 522. And such is the universally recognized doctrine. It is not said there must be direct proof that the vendee was present at the time and place appointed for the delivery, with the money in hand with which

to make payment, but there must be evidence from which a jury may legitimately infer that he was then and there ready. The reasonableness of the rule is well illustrated in the present case.

By the contract, the obligations of the parties were concurrent. The delivery of the oil and the payment of its price were to be at the same time. Where the plaintiff resided, we are not informed by the evidence, though it does appear that almost immediately after the contract was made, he left for Philadelphia. It does not appear that he was himself or that he had any agent at the cars, at the time fixed for the delivery. But the instant the oil was in the cars at Pittsburgh, the defendants had a right to their money. They were not bound to wait till its arrival at Philadelphia, or whatever place might have been its point of destination. Until they received the price, they might retain possession. And the plaintiff's readiness to receive the oil and to pay if he was ready, was a positive fact, within his knowledge, and capable of being proved by him. To prove it, however, he made no attempt, and so far as any evidence exists in the cause, it rather tends to prove that he was not ready. He was not, therefore, entitled to recover, and the jury should have been so instructed in answer to the defendant's points.

We cannot forbear remarking that we do not approve of such a mode of presenting points to a court as was adopted in this case. The attention of the judge should have been directed specifically to the defect in the proof, instead of requiring him suddenly to pronounce upon the whole case, as if it had been a demurrer to the evidence.

RECENT ENGLISH CASE.

Vice-Chancellor Kindersley's Court.

NORVAL *v.* PASCOE.

A landowner granted a license to dig and carry away metallic ores, to erect machinery, &c., to three miners, who covenanted, jointly and severally, *inter alia*, to compensate him for all land, not included in the license, rendered permanently useless by deposit thereon of spoil, &c., at £100 per acre. Two

of the three licensees assigned their interest to P., who worked the mines and died. About one acre being rendered permanently useless, the landowner claimed £100 as a creditor against the estate of P.

Claim allowed.

This was an adjourned summons on the question whether Lord Clinton, as the owner of land under which were certain mines in Cornwall, was entitled to compensation under a covenant entered into with him by his licensees, whereby he was entitled to compensation at £100 per acre for all land not included in the license, which should be rendered useless by spoil, &c.

The right thus claimed was not against the licensees, but the estate of an assignee from two licensees out of three, the covenant being joint and several. The license in question was dated April 25, 1857, and was by indenture, between Lord Clinton of the one part, and John Williams, Gustavus Kiekhoefer, and Thomas Brignall Laws, of the other part, whereby it was witnessed that, in consideration of the rents and covenants and a contract with Charles St. Aubyn, Lord Clinton granted and demised to them a license to search for, dig, &c., all tin, copper, and lead ores, and make the same fit to be smelted, and all other minerals, with certain exceptions; also a license to remove and carry away such minerals, and to erect engines, machinery, and buildings, except a smelting house, and to divert watercourses, for the purpose of the works. Such license to be for twenty-one years, determinable on six months' notice to Lord Clinton, who was bound to account for ores gotten in enlarging adits; and the said J. Williams, G. Kiekhoefer, and T. B. Laws, did thereby jointly and severally for themselves, their executors, administrators, and assigns, covenant with Lord Clinton to weigh the metals at specific times, to render accounts, to pay the rent, and *bona fide* to work and erect engines, &c., with as little damage as possible; and that for the injury or damage, whether immediate or consequential, which might be occasioned in exercising the license, reasonable compensation for the same should be paid by the licensees to the landowner, and particularly that for so much of the surface not already covered with mining stuff, which should from time to time be so covered, or excavated for shafts, or otherwise rendered permanently useless, the compensation to be paid should be after the rate of £100 per acre for the portion of land so injured, with a due addition of the costs of fencing dangerous places, and damage to adjacent property, to be accounted in the nature of rent, payable quarterly, with

such a sum as should be required to restore it to its original condition, to be determined by arbitration. On the 18th of October, 1857, Messrs. Kiekhoefer and Laws assigned the benefit of the license to John Pascoe, who worked the mines until his death. Williams being no party to the assignment, and a suit being instituted to administer Pascoe's estate, Lord Clinton claimed in that suit as a creditor on Pascoe's estate for £100 surface land, to the extent of about an acre being covered with spoil, and coming within the terms of the covenant, and the present summons was taken out to determine the questions, first, whether such a covenant ran with the land, and, if so, whether it did so in the case of mere license, and, if it did, whether Pascoe's estate was bound, inasmuch as the assignment was by two only out of the three licensees.

Karslake appeared in support of the summons.

Glasse, Q. C., and *Bagshawe, contra.*

Karslake, in reply.

Authorities cited:—*Muskett* v. *Hill*, 5 Bingle N. C. 694; *Baily* v. *Wells*, 3 Wils. 25; *Martin* v. *Williams*, 1 H & N. 817; *Doe* v. *Wood*, 2 B. & Ald. 724; *Vyvyan* v. *Arthur*, 1 B & Cr. 410; *Spencer's case*, 5 Rep. 15; Smith's Lead. Cas. 4 ed. 37; *Buckeridge* v. *Ingram*, 2 Ves. jun. 652; *Mayor of Corgleton* v. *Pattison*, 10 East. 130; *Merceron* v. *Dowson*, 5 B. & Cr. 479; *Keppell* v. *Bailey*, 2 My. & K. 517; Bainbridge on Mines, 257; *Earl Portmore* v. *Bunn*, 1 B. & Cr. 694; *Moore* v. *Gregg*, 2 Phill. 717.

June 22.—KINDERSLEY V.C., after stating the facts, said that the question on this summons was, whether Lord Clinton, under the circumstances, was entitled to stand as a creditor against Pascoe's estate—that is, supposing Pascoe was alive, whether he could have an action against him on the covenant, or an action of debt. Three points had been raised, first, whether merely with respect to that which was covenanted to be done, the assignee was bound, leaving out of consideration for the present the question as to their being a mere license (not a lease) as to lands or mines, and also the question of the assignment being by two only out of three, to a single individual who had covenanted in the same terms; secondly, assuming the covenant was by a lessee of land, and would bind his assignee, whether the assignee was bound in the present instance, having regard to the circumstance that the covenantors were not lessees, but only grantees of a license; and thirdly, whether, assuming the covenant to be binding on the assignees, supposing all parties joined in the assignment to

Pascoe, it would bind him if the interest of only two out of three was made the subject of such assignment. On each of these questions there were many cases, but it was not easy to find any direct authority; such questions being seldom raised in the Court of Chancery, most of the authorities being at common law; but his honor would consider the cases as they bore respectively on each question. Suppose this had been a lease, was the covenant such as would run with the land? The first case was *Vyvyan* v. *Arthur (supra)*, which was a case of a lease of lands, the lessee to grind all corn produced thereon at a mill not included in the demise, and the lessor having devised the reversion of the demised premises, the question was, whether the assignee of the devisee might have an action on the covenant, the case being the converse of the present, and it was held in the nature of a rent or service that the covenant did run with the land at common law, and the devisee might maintain an action. In *Keppel* v. *Baily (supra)*, *Vyvyan* v. *Arthur* was cited, and the observations made upon it were to the effect that it went further than any other case, leading to the inference that it went further than it ought. Another case more resembling this, because it was the case of a license only, was *Martin* v. *Williams (supra)*, the license being to dig and carry away China clay for twenty-one years (here it was tin and copper ore, but that made no difference, it was the same as far as related to the nature of the interest), and there was a covenant to the grantee to pay to the grantor compensation for all uninclosed land which was injured, which were not included in the license; and it was held that the assignee of the grantor might maintain an action on the covenant (also the converse of this case; but that mattered nothing, for if the covenant could not run with the land in one case it could not run in the other), and it was held that the covenant did run with the land. Baron Martin made these observations:—"It has always been considered that if the lessee could maintain covenant against the assignee of the lessee, the assignee of the lessor could maintain covenant against the lessee,"—a proposition the soundness of which could not be questioned. These authorities were, therefore, sufficient to establish the proposition on the mere dry question whether such a covenant ran with the land, that it would, in the case of a lease of a mine; and that an action of covenant would lie either by the assignee of the grantor against the lessee, or by the grantor against the assignee of the lessee. The second question was this: suppose the

covenantor was only grantee of a license, it was contended that the interest of the licensee was not an estate in land, but only an interest in respect of the land, in the profits to be obtained in a particular way. That was true, but the question was, whether the doctrine of the assignee being bound applied to other hereditaments than land? It was held to apply to tithes, which were incorporeal hereditaments: *Earl of Egremont.*v. *Keene*, 2 Jo. Ir. Eq. 307, was a case of a lease of customs of profits of fairs and markets for thirty-one years, with a covenant to pay the rent, and the lessee assigned his interest, and on an action by the lessor against the assignee, a verdict was given for the plaintiff, and on a motion *in banco* the verdict was affirmed, although it was not a lease of land. *Lord Portmore* v. *Bunn (supra)* was a case of water by a certain cut supplying a mill, and it was held to be a hereditament real, although not a lease of land, and the assignee of the licensee was liable on the covenant, being only a license to use the channel; that was very strongly in point, although *Martin* v. *Williams* more resembled the present case; *Lord Portmore* v. *Bunn* was the converse of this case, the covenant being the same, and therefore almost on all fours with it. His honor thought these cases concluded the second question, and he was of opinion first, that, with respect to what was covenanted to be done, it did not prevent its running with the land; and secondly, that in the case of a mere license like the present, the covenant would run with the land. The third question presented some difficulty, there being no precise authority, the question being a very peculiar one—namely, whether, assuming the covenant would bind the assignee of the whole interest, inasmuch as Pascoe was only assignee from two and not all three joint tenants, it would bind him. The covenant here was joint and several; the grant being to three made them joint-tenants, there were no words in the license making them tenants in common. In other words, there was a covenant by three, and by each separately and individually. As far as it was a joint covenant by the three, what was the effect if two out of the three assigned their interest to Pascoe? His Honor had scarcely been able to find any authority other than the cases cited on either side; first, there was *Twynam* v. *Pickard*, 2 B. & Ald. 105, where the covenant was by the lessee with the lessor to repair, and the lessee having assigned, not the whole of his interest, nor an undivided portion, but the reversion of a particular portion, the question was, whether the assigner could have an action of covenant in respect of the non-repaie

of that particular portion, and it was held that he could. That case went somewhat towards the point, but did not decide it. Another somewhat similar case was *Stevenson* v. *Lambard*, 2 East, 575, presenting a second set of circumstances where there was a lease for years of a warehouse and premises, and a covenant by the lessee for himself and his assigns to pay the rent, and the lessee assigned to the defendant. The lessor was evicted by one with a paramount title from an undivided moiety, and the lessor only having a moiety, brought an action of covenant against the assignee of the lessee to recover the half-year's rent. The defendant pleaded the eviction, and it was held that the rent would be apportioned, and the plea was wrong because it was to the whole claim; had it been as to a moiety, it would have been good; but leave was given to amend the plea. The inference was clear, that where a lessor granted a lease of the whole premises, and it turned out he only had a right to grant a moiety, he had an action against the assignee for that moiety, and the rent and the covenant were both apportionable. That case was another step, although not up to the point. It was evident, on these and other cases, that the tendency of the courts of law was to modify in some degree the extreme strictness and rigidity of the rule on questions of covenant more and more, so as to do justice; and in *Stevenson* v. *Lambard*, this was accomplished, notwithstanding the eviction. In *Gamon* v. *Vernon*, 2 Lev. 231, the same sort of principle was applied under a third set of circumstances. A lessee of land assigned an undivided moiety for the whole term, and it was held that an action of debt would lie by the lessor against the assignee. A motion was then made on the assumption that the reservation of rent implied a covenant to pay, and it was held that it did; so that the right of action was apportioned. These cases approached nearer and nearer to the present. In the case of *Merceron* v. *Dowson (supra)*, there was a lease for ninety-nine years of premises with a covenant by the lessee to repair, and he assigned his interest (a fourth state of circumstances) to the defendant and other persons as tenants in common, and an action of covenant was brought by the lessor against one assignee for non-repair, and the defendant pleaded in bar that he had only an undivided part with A, B, and C during a certain portion of the time, and he never was assignee of the whole interest, and it was held that the plea was bad because he was liable to a part of the demand, and he might have pleaded as to all but that part with respect to which he was liable, but not to the whole. It appeared by

the judgment that there might have been a plea in abatement that the action should have been against the defendant and his co-tenants in common, and that such plea might have been good, but the plea being in bar was bad on that ground. If there had been a plea in abatement, it would have notified to the plaintiff who were the persons whom he ought to have joined in the action, and then he would have had judgment against all of them, but the plea was bad because it was a denial of the right to anything. These were the only authorities his honor could find bearing on the present question with respect to a joint covenant, and two out of three assigning their share, as they did in this case, to Pascoe. What was the right of Lord Clinton against Pascoe at law, supposing he were alive, and would it be the same, either in an action of covenant or debt as if it was against the three? If the action was brought to recover the whole against two third shares, which only were assigned, then Pascoe might plead, as to one-third, that he was not liable, or if for the whole, he might plead in abatement, and require that Williams should be joined, and if Williams joined with the other parties, then it would be on the joint covenant. Lord Clinton could maintain an action as to two-thirds of £100 under the covenant, and if he brought his action for the whole, Pascoe might plead that he was only liable for two-thirds, and in either case there would be execution against him. Here there was the additional circumstance that the covenant was joint and several, and Kiekhoefer and Laws having assigned their interest to Pascoe, that being an interest in a joint tenancy, the assignment was a severance of it, and each assigned his share, each having covenanted with Lord Clinton for the whole, and in that view he had a right to recover as against Pascoe, as a creditor for the amount which, according to the terms of the covenant, was the *quantum* of damage for spoil, a result which commended itself to his honor's mind as exactly consonant with justice, for Pascoe, although he only took the two-thirds, had been, in fact, working the whole. The debt must be allowed.

RECENT CANADIAN CASE.

Court of Common Pleas of Upper Canada.[1]

SAMUEL DICKSON, *Appellant*, and JOHN H. AUSTIN, *Respondent.*

The lessee of a mill, situate near to a river, and driven by water drawn in a channel from it, sued for damages sustained by him by reason of the obstruction of the flow of the stream, caused by the defendant throwing slabs and other waste stuff into the stream, and thereby obstructing the flow of water into the channel aforesaid. The lessor of the plaintiff was the owner of the land adjoining the stream, and also of the land surrounding the pond used for the working of the mill.

Held, affirming the judgment of the court below, that the lessee had a right to maintain such action; and that the declaration stating the plaintiff to be possessed of land and premises near to the river, and as such entitled to the use of the stream for the working of his mill, was sufficient.

This was an appeal from a judgment of the Court of Common Pleas, refusing a nonsuit in a cause pending in that court, wherein the respondent was plaintiff and the appellant was defendant. The case is reported in the eleventh volume of the reports of that court, where the pleadings and evidence are so fully set forth as to render any statement of them here unnecessary.

From that judgment the defendant in the action appealed, on the following among other grounds:

1. That it was not proven at the trial that the plaintiff was possessed of lands and premises adjacent and near to the river Otonabee, which gave him the right to have and enjoy the benefit of the waters of that river for the purpose of working his mills, being upon the said lands and premises.

2. That it was not proven at the trial that the plaintiff was possessed of lands and premises adjacent and near to the river Otonabee, which entitled him to the use and flow of the stream,

[1] Before the Hon. Archibald McLean, Ex Chief Justice, President; the Hon. W. H. Draper, C. B., Chief Justice of Upper Canada; the Hon. P. M. Vankoughnet, Chancellor; the Hon. W. B. Richards, Chief Justice of the Court of Common Pleas; the Hon. Vice Chancellor Esten; the Hon. Mr. Justice Hagarty; and the Hon. Mr. Justice Adam Wilson.

for the benefit and enjoyment of the said lands with the appurtenances.

3. That the title which the plaintiff proved he had under the lease from Robert D. Rogers to the plaintiff and Jacob Vanalstine, and under the memorandum of agreement made between the plaintiff and Vanalstine, was not such a title as entitled the plaintiff to a verdict on the issues raised by the defendant in his second and third pleas; and the right of the plaintiff under such lease and agreement being but a limited right, and for a limited period, and being but a lease only, it was necessary for him, if he claimed to recover in respect thereof, to set the same forth, and how conferred; and he had no right to avail himself of the title and right of said Rogers as a riparian proprietor, to entitle him to recover under the allegations in the declaration and the issues raised thereon.

4. That the evidence at the trial was such as entitled the appellant to have had his rule *nisi* to enter a nonsuit made absolute.

The plaintiff contended that the judgment was correct, and ought to be affirmed for the reasons following:

1. Because the respondent, by virtue of the lease from Robert D. Rogers to him and one Jacob Vanalstine, and the assignment from Vanalstine to the respondent, became entitled to all the rights and privileges of the said Robert D. Rogers as a riparian proprietor in the use and enjoyment of the waters of the river Otonabee, for the purpose of working the mills demised to the respondent.

2. Because, by virtue of the possessory right acquired under the said lease from the said Rogers, the respondent became entitled to the enjoyment of the waters aforesaid; and it is in respect of such possessory right that the allegations of the declarations in that behalf are to be understood.

3. Because, whenever a possessory right is prejudiced or affected, it is unnecessary, so far at least as a wrong-doer is concerned, to set forth the manner in which the same is derived with any particularity, and any general allegation and proof of possession is sufficient to sustain the action.

4. Because the duration or limitation of the defendant's right of possession is only an element in the computation of damages, and cannot affect his right of action.

5. Because, during the existence of the lease to the respondent, the said Robert D. Rogers could not have maintained any action against the now appellant, save in respect of his reversionary interest, and the right, therefore, to sue for the inter-

vening injury to the possession must be in his lessee, the now respondent.

6. Because the injury complained of is in violation of the provisions of the consolidated statutes of Upper Canada, chapter 47 (page 454), section 284.

Read, Q. C., for the appellant, referred to *Austin* v. *Snider*, 21 U. C. Q. B., 299. It is shown that Rogers, when erecting his mill, constructed the dam in such a manner that the slabs were prevented from floating down the stream, which they would have certainly done if left to the natural influence of the water.

The mill of the respondent is built at such a distance from the river that it cannot be said that this is a reasonable use of the water. *Shears* v. *Wood*, 7 J. B. Moore, 345; *Moore* v. *The Earl of Plymouth*, 3 B & Ad. 66; and *Bird* v. *Randall*, 3 Burr, 1345, show that a party, having once received compensation for a wrong complained of, is precluded from seeking damages at the hands of another.

In this case, Austin must be looked upon as the author of his own mischief, as, by the improper mode of constructing the pond and raceway adopted by him, the slabs and refuse are drawn into them.

He also contended that Austin, under the averments in his declaration, was bound to show that he was a riparian proprietor, which he failed to do, the fact being that land intervenes between him and the bank of the stream. *Fentiman* v. *Smith*, 4 East, 107.

Austin, in his declaration, alleges his right to the use of the water to be by virtue of his possession. The fact, as proved, is, that he claims by virtue of the grant. Claiming under a lease, he ought to have set it out, and not asserted a claim as proprietor. The right to the water in this case is personal, not appurtenant to the mill. An assignment of the mill would not carry as appurtenant a right to the water. In *Northam* v. *Harley*, 1 Ell. & B. 665, cited in the court below, the right was appurtenant, which is sufficient for the explanation of that case. In such a case, where all claim under the same deed, it is sufficient to allege title by possession as against such parties. *Embrey* v. *Owen*, 6 Exch. 353.

A. Crooks, Q. C., for the respondent.

If the argument of the other side be acquiesced in, it would show that Rogers never had any right to construct the pond and raceway; but the law would appear to be different as enunciated by Lord Kingsdown, in *Miner* v. *Gilmour*, 12 Moo.

P. C. 131. Rogers, if in possession of and working this mill, could certainly have maintained this action, and so also can his lessee. *Addison on Torts*, pp. 10, 63 and 64; *Eddingfield* v. *Onslow*, 3 Lev. 209.

Here Austin stands in the place of Rogers, and can declare in the same form. *Tucker* v. *Paren*, 7 U. C. C. P. 269; *Laing* v. *Whaley*, 3 Hurl. & Nor. 675.

Even admitting that a natural right exists of throwing slabs, &c., into a stream, so as to injure a party making a reasonable use of the water, which will scarcely be contended for, the legislature has excluded all considerations of that sort by prohibiting the very act which is now complained of.

Counsel also relied on the cases cited in the court below, and Con. Stat. U. C. cap. 48, secs. 3 and 13.

The judgment of the court was delivered by

ESTEN V. C.—The evidence has not been given to us in this case; but the facts appear to be, that one Rogers owned the land forming the pond and around it, and through which the raceway was constructed, and on both sides of the river at this place, and the land and mills in question, and demised such land and mills, with the right of using a certain quantity of water, to the plaintiff and one Vanalstine, for the term of ten years; and that Vanalstine transferred all his interest in the lease to the plaintiff, that at this time a dam and pond and raceway existed, which conducted the water of the river to these and other mills, which dam, pond and raceway had existed for more than eight years; and that the owners of mills higher up the river, and amongst them the defendant, had been for many years in the habit of throwing slabs and pieces and grindings of slabs into the river, which gradually accumulated in the pond about the mouth of the raceway, and prevented the water from entering the raceway and flowing to the different mills in the same, or in nearly equal quantities, as before. Under these circumstances the present action was brought. It cannot be doubted that the plaintiff is making a reasonable use of the water of the river in turning his mills, and that the defendant, in throwing a quantity of rubbish into the stream, so as to obstruct the flow of the water into the raceway, is a wrong-doer. It was objected that the plaintiff was not a riparian proprietor, because his premises did not extend to the bank of the river; but it cannot be doubted that Rogers himself, if he occupied these mills, could claim all the rights of a riparian proprietor; and can it make any difference that he has demised the mills to the plaintiff, reserving a narrow strip

of land between the mills and the river? The plaintiff stands in the place of Rogers, and is entitled to the same remedies during the time that his interest continues.

It was also objected that the declaration was improperly framed, and the right of the plaintiff not correctly stated in it, and that a variance existed between the statement and the proof, inasmuch as the right was claimed in respect of the possession, whereas it appeared from the evidence to have been derived from a grant. But this appears to me to be a mistake; and it appears to me, although I express an opinion on the subject with much diffidence, that the declaration was framed with precise accuracy. The right created by the grant was not the subject of the action. The defendant, Dickson, could not be charged with a contravention of the grant, because he was not bound by it, or bound to give effect to it. Any riparian owner injured by his act could have complained of it. The plaintiff complains as a general riparian proprietor, and it is of no importance how he became such; whether by this lease, or by conveyance, or by devise. The lease in the present case seems to me to be only incidental, as showing how the plaintiff became a riparian proprietor, and so entitled to complain of the wrongful act of the defendant, which has inflicted injury on him in common probably with other mill-owners equally entitled to complain. It is strictly by virtue of his possession of the premises in question, that the plaintiff is entitled to complain of this injury. If he had become a riparian proprietor in any other way, he would have been equally entitled to complain of this act of the defendant, if it caused him injury. But even if the right created by the grant were the subject of the action, the case of *Northam* v. *Harley* shows that the declaration is properly framed. It appears from that case that where the easement is annexed by the terms of the grant to the land as appurtenant, it is sufficient, in seeking redress for an infraction of the very right, to claim it by virtue of the possession of the land. In the present case it cannot be doubted that the grant of the use of the water was to the lessees of the mills. The right is annexed as appurtenant to the land, and it is sufficient even in this view to claim the right by virtue of the possession of the land. Then, if this action were brought against Rogers, or any one claiming under him, for an infraction of the right given by the lease, it would have been sufficient to frame the declaration as it is framed. I think, therefore, that the judgment discharging the rule was right, and ought to be affirmed with costs. It was argued that the raceway was constructed in

such an unskilful manner, that it was the cause of the mischief of which the plaintiff complained; but no evidence seems to have been offered in support of this position.

Per Curiam. Appeal dismissed with costs.

DIGEST OF RECENT CASES.[1]

Evidence.

A catalogue of the students of an academy is not evidence, unless the party against whom it is offered has admitted or assented to its correctness. If offered generally, a verdict will not be set aside because it is used for proof of other matters by the other side.

A verdict will not be set aside because a juror had heard the case discussed, if that fact was known to the party objecting, or his counsel.

Where words are interlined in an information, they will be read so as to make sense, without regard to the place of the caret.

An information for omitting a voter's name on the check-list will be defective unless it is alleged that the selectmen accused knew his right.

An intention to remain permanently, or for some indefinite time, is essential to make the place of actual residence the home of the party.—*State* v. *Daniels*, 44 N. H. 283.

Foreign Attachment.

If an inhabitant of another State is duly served with a process of foreign attachment, when within this State, he must appear and answer, or judgment will be rendered against him on his default.

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[1] These abstracts have been taken from the reports of recent English cases in the different periodicals, mainly from the *Weekly Reporter*, an excellent and reliable journal of legal matters, from advance sheets of the official reports, kindly furnished us by the reporters of the various States in which the decisions were rendered, and from reliable legal journals in this country.

If he appears, and upon his disclosure, or by verdict, it appears that he has no property of the principal debtor in his hands within this State, and is not liable to the principal debtor upon any contract to be paid or performed in this State, he will not be charged as trustee.—*Lawrence* v. *Smith*, N. H. Supreme Court, Rockingham Co.

Insolvency.

The property of certain insolvents was assigned by compulsory process of law in Massachusetts. At the time of the assignment a vessel, the property of the insolvents, was on the high seas on a voyage from the Pacific Ocean to New York. On her arrival she was attached by certain creditors of the insolvents residing in New York.

Held, by *Leonard P. J.*, and *Clarke J.*, that the assignment would prevail, and that the assignees were entitled to the ship in preference to the attaching creditors, *Sutherland J.* dissenting.—*Kelly* v. *Crapo*, N. Y. Supreme Court, Gen. Term, Feb. 1864.

Insurance.

The omission in an application to a mutual insurance company for insurance, to mention an existing policy in the same company, does not render the policy void, but the policy will be confirmed by the assent of the directors to a transfer of the policy, all the facts appearing on their records.

Notice of loss will not be rendered ineffectual by the omission to mention that the debt of the assignee, as mortgagee, was also secured on other property.

Where property insured is conveyed, and the policy is assigned with the assent of the directors of the company, an assessment made against the original assured and notice to him, will not cause a suspension of the policy, in case of non-payment. The assignee, after the assent of the directors, is the party entitled to notice.

Notice of loss given by the assignee is sufficient in such case.

The agent, by whom an insurance is obtained in his own name for the benefit of another, may maintain an action upon it.

Where a promise is made to one sustaining the character of a trustee, he is the proper person to bring an action.

By the assent of the directors to an assignment of a policy

to a mortgagee of the property, the assignee becomes a member of the company, and may sue in his own name, where the by-laws allow such assent to be given.—*Barnes* v. *Union &c. Insurance Co.*, N. H. Supreme Ct., Hillsborough Co.

A policy of insurance in the ordinary printed form contained after the words "the said ship and goods are and shall be valued at" £ ; the words "as under," in writing and at the foot of the policy, was written "£1300 on freight warranted free from capture, etc." In the margin at the top of the policy was written, "£1300."

Held, that the amount named in this policy must be taken to refer to the insurable interest, and not to the value of the subject matter of the insurance, and that therefore the policy was open.—*Wilson* v. *Nelson*, Q. B. May 11, 1864.

A vessel having been chartered to convey a cargo of coals to China, and having become damaged, the master was forced to discharge the cargo, and the owner of the vessel declined to reship it, on the ground that having become wet, it was liable to spontaneous combustion.

On a bill by the charterers to restrain the owner from employing the ship in any manner inconsistent with the charter party, the court directed an inquiry as to the state of the cargo, and granted an injunction pending such inquiry.—*Heriot* v. *Nicholas*, Lord Justice's Court, May 27.

Jurisdiction.

Where a judge is prohibited, by statute, to sit in a cause under certain circumstances, he has no jurisdiction, and his proceedings are void.

Generally, the proceedings of a judge, in cases where there is at common law just ground of exception to him, as being interested, related to the parties, or having been counsel, or the like, are erroneous;—voidable, not void; except in the case of inferior tribunals, where error or appeal does not lie.

A judge of probate, who has written a will, is disqualified to sit upon the probate of it; but upon appeal, the will may be proved in the court above.

The will written by a judge of probate, and executed under his direction, though in violation of law, is not void.—*Moses* v. *Julian*, N. H. Supreme Ct., Rockingham Co.

Notices of New Books.

A Treatise on the American Law of Real Property. By Emory Washburn, LL. D., Bussey Professor of Law in Harvard University. Author of a Treatise on the American Law of Easements and Servitudes. *Second edition. In two volumes.* Vol. I. pp. xiii—666; Vol. II. pp. 890. Boston: Little, Brown and Company. 1864.

That a second edition of a work on the law of real property should be called for in this time of war, with the comparatively small amount of litigation in respect to real estate which now engages the attention of our courts, and when the cost of books is so much advanced, must be certainly no slight source of gratification to an author. And this is still more the case, when, as in the present instance, the book has been allowed to take the position to which its merits entitle it, without any unusual heralding of its advent, or any extravagant claims to the public regard being put forth on the part of its publishers.

The first volume of the first edition was published in the latter part of the year 1860, and the second volume was published in the year 1862. It is one of the first, if not the first, book on any branch of real property law which has been prepared and published with the avowed intention of making an American book. And this is one pre-eminently distinctive feature which has given it much value, and to which its great success is fairly attributable. To those who are familiar with the reputation of its author, while at the bar and on the bench, it would be unnecessary to allude to the untiring industry with which authorities have been consulted, the judicial fairness with which they have been weighed, and the sound good sense which characterize the whole work. It is seldom that a lawyer of the extended practical experience of the author, can find opportunity or disposition in the maturity of his power, while his mind is still in full vigor, to elaborate carefully prepared treatises. One such instance exists in the commentaries of Chancellor Kent, whose value for the future can scarcely be over-estimated. Another instance we have in these volumes.

The second edition exhibits the same careful attention and honest personal effort on the part of the author, to keep the work correct, that the former edition shared to give it those qualities in the first instance. The author speaks almost apologetically of the number of cases which have been cited, a circumstance for which, in our judgment, no apology is ever needed, provided only that the citations be correctly made, so that they may be found, and be of cases pertinent to the matter in question, so that they may be of value when found. The paging of the original edition has been preserved in the margin, and great care has apparently been taken to facilitate the use of the

new edition, where reference has been made to the former one.

There is no better text-book on the American law of Real Property than Professor Washburn's, and the second edition is better than the first.

A SUMMARY OF THE LAW OF PARTIES TO ACTIONS AT LAW AND SUITS IN EQUITY. By OLIVER L. BARBOUR, LL. D. Albany: W. C. Little, Law Bookseller. 1864. pp. 611.

This work of Mr. Barbour supplies a want which has long been felt. It is excellent in its plan, and the plan appears to have been carried out in a manner to make the book useful; and with such ability and fidelity as to make it reliable. The author announces it to have been his purpose to state in the concisest possible form what the law is in this country on the subject of parties at law and in equity, as the same is declared in judicial decisions, and as it is modified or changed by the New York code of procedure, or other statutory enactments. This has been faithfully done; and a very limited inspection of the notes indicates at once the wide range of the cases cited, and testifies in the most decisive manner to the general utility of the book throughout the country. It is the only authority on the subject to which reference can now be made in this country with any certainty that the law has not been changed by enactments subsequent to its date, and is the only American treatise on the subject of Parties to Actions at Law. It gives the American law rules, and then the modifications by statutory provisions in the various States, and a very abundant citation of decisions of the courts of the different States. It has another merit, now happily becoming more frequent than was formerly the case in text-books, of not being lumbered up with useless English law. It contains all that is necessary of English law, and a full and satisfactory statement of the American law, on the subject of which it treats. By undertaking to give settled law only, the author is enabled to state the propositions positively; and this with the excellent and orderly arrangement of the subjects, puts the information desired in the possession of the reader, without the necessity of collating different passages of apparently contradictory tendencies, an exercise profitable to students, perhaps, but not satisfactory or desirable in a hand-book for practical use. We can recommend the work cordially, in the full belief that it will be found reliable, serviceable and convenient.

A MANUAL FOR THE USE OF NOTARIES PUBLIC, AND BANKERS. By BERNARD ROELKER, A. M. of the New York Bar. FOURTH EDITION, WITH NUMEROUS ADDITIONS, etc. By J. SMITH HOMANS, Editor of the "Banker's Magazine and Statistical Register," New York. New York: Published at the office of the "Banker's Magazine." 1864.

This work, which has stood the test of three separate editions, and been found to meet a need of the public, now appears in a new edition, with many additions. Such books, so far as they contain precise statements of the course to be pursued, in order to preserve legal rights, are useful, if prepared with care, and by competent persons. The names of the authors of this work are a sufficient guaranty,

both of good judgment and ability, to assure non-professional readers of the value of the book. To the professional lawyer they are of but very little value. The arrangement of topics and of the digest of cases, is not such as to adapt it to professional use. For notaries public, and for bankers, "for whom it is especially adapted," and for the public generally, it is a compact and serviceable manual.

THE EXCHEQUER REPORTS. *Reports of cases argued and determined in the Court of Exchequer and Exchequer Chamber*, Vol. VII. *Trinity Term, 24 Vict. to Hilary Vacation, 25 Vict. both inclusive.* By E. T. HURLSTONE and J. P. NORMAN. With additional cases decided during the same period, selected from the contemporaneous reports, with references to decisions in the American courts. HENRY WHARTON, Esq., editor. Philadelphia: T. & J. W. Johnson & Co., 535 Chestnut Street. 1864.

A new volume of this series of the Exchequer reports needs no further recommendation than the mere announcement that it is published. They have come to be a necessity with the profession, and their cheapness will render them more than ever desirable at the present time. The present volume has many cases of interest and value to the profession and the public. Amongst these are the cases of McCormick *v.* May, p. 25, *et seq.*, in which question was made as to the validity of an English patent for a reaping machine, which, it was held, was invalid, as substantially the same machine had been described in the Journal of the Franklin Institute, prior to the date of the patent in England.

In Shingen *v.* Holt, it was held that in a case of interpleader as to the title of goods seized by the sheriff, between a married woman, living apart from her husband with the execution debtor, the question of title was decided as if the claimant were a single woman. Ford *v.* Dacy, p. 150, involves the question of a change of county boundaries by a change in the course of a stream. The Stockport Water Works Company *v.* Potter, was the case of an action for discharging poisonous matter from the works of the defendant into a stream which fed the reservoir, from which the plaintiffs distributed water to their customers, in which the question of how far a trade which has become obnoxious on account of the growth of a town in its vicinity, is a nuisance, is discussed.

In Seymour *v.* Greenwood, it is held that a master is liable for injury caused by the wanton and violent conduct of the servant in the course of his employment.

There seems to be less than the usual number of cases turning upon the construction of the English statutes merely.